UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 24

HORIZON LINES OF PUERTO RICO INC.

Case No. 24-CA-075533

and

INTERNATIONAL LONGSHOREMEN ASSOCIATION, LOCAL 1575

MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT THEREOF

TO THE NATIONAL LABOR RELATIONS BOARD:

COMES NOW, HORIZON LINES OF PUERTO RICO INC., through its attorneys, and most respectfully **STATES** and **PRAYS** as follows:

The referenced Complaint charges violation to sections 8(a)(1) and (5) of the Act for purportedly having carried out conduct allegedly comprising a mandatory subject of collective bargaining "without prior notice to the Union and without affording the Union an opportunity to bargain with . . . respect to this conduct and the effects of this conduct." See Complaint, ¶ 8(c). Respondent moves for summary judgment in its favor as to the decision-bargaining contention of the Complaint on the following grounds¹:

¹ Respondent has raised several defenses regarding the decision-bargaining contention of the Complaint, including but not limited to that the conduct in question is a clear management prerogative over which there is no obligation

- A. Assuming the Respondent's conduct involved a mandatory subject of collective bargaining, the union waived by inaction any right to bargain over the decision since the undisputed facts of the case show that it never requested it, see p. 12-20, infra;
- B. In any case, assuming the Respondent's conduct involved a mandatory subject of collective bargaining, the union waived by contract any right to bargain over the decision since the undisputed facts show that the parties bargained this to an agreement incorporated into clear and unmistakable provisions of the Collective Bargaining Agreement, see p. 20-25, infra.

For the orderly discussion of this request, respondent will first start with a concise statement of the case (p.2, <u>infra</u>). It will then discuss the applicable summary judgment standard (p.9, <u>infra</u>), to proceed thereafter with its argument presenting first the applicable law for each of the above contentions in order to apply the pertinent material facts to the applicable law in each instance.

On this same day, the Respondent is filing a Statement of Uncontested Facts in Support of Motion for Summary Judgment with specific reference to the record together with its supporting evidence.

STATEMENT OF THE CASE

At all material times, Horizon Lines of Puerto Rico Inc. (after this "Horizon"), has been a corporation with an office and place of business in San Juan, Puerto Rico, and has been engaged in the handling, loading and

to bargain. By presenting this Motion for Summary Judgment, Respondent waives none of said defenses. This Motion is presented under the assumption, for the sole purpose of the request for summary judgment, that the

unloading of cargo vessels. The International Longshoremen Association, Local 1575 (after this "the Union"), has been a labor organization within the meaning of Section 2(5) of the Act representing a defined unit of workers in Horizon appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act. See Statement of Uncontested Facts, ¶1 and 2.

Horizon and the Union have been signatories of a Collective Bargaining Agreement covering the period of October 1, 2004, through September 30, 2010, which was extended in writing until September 30, 2012. See Statement of Uncontested Facts, ¶3. Manuel López Llavona has been Director of Labor Relations for Horizon since 1989, as such he has been and continues to be a member of the Senior Staff and the Spokesperson of the Company for bargaining purposes. See Statement of Uncontested Facts, ¶4.

As Director of Labor Relations for Horizon, Mr. López-Llavona also participates and has participated since 1989 in the Grievance Committee with the Union, which is part of the Grievance and Arbitration procedure established in the Collective Bargaining Agreement to resolve grievances and disputes. It is customary for the parties to address in the Committee several grievances and disputes in each meeting, some of which disputes the

Company learned of that very same day. Accordingly, in any given meeting the Committee could and in fact have entertained more than ten (10) different grievances or disputes, discussing each one, finding solutions when possible and agreeing to disagree in other instances. See Statement of Uncontested Facts, ¶5.

On February 27, 2012, Mr. López-Llavona on behalf of Horizon informed the Union in writing that effective February 29, 2012, it will not recruit the following positions:

1 utility Maintenance Department

2 facilities Maintenance Department

1 janitor Marine Department

Mr. López Llavona, moreover, informed the Union in the February 27 letter that the Collective Bargaining Agreement and the custom and practice provided how to proceed in these cases: the affected persons will occupy the first positions in the applicable alternate lists. This letter was notified to the Union on February 27, 2012 by fax, by email, and by Certified Mail Return Receipt Requested. Mr. Lopez-Llavona also informed the Union in said letter that if it wanted to discuss the effects, if any, of this decision he will be available to do so on February 28 and 29 at the Conference Room of the Fairland Building. See Statement of Uncontested Facts, ¶6-9.

As announced in the February 27, 2012 Letter, Mr. Lopez-Llavona and his bargaining team were available on February 28 and 29th to meet with the Union at the Conference Room of the Fairland Building, but the Union did not show. Neither on February 28, 2012, on February 29, 2012, nor at any time prior to the filing of the Complaint in this case, the Union requested or asked Mr. Lopez Llavona to bargain over the decision not to recruit the named positions. See Statement of Uncontested Facts, ¶10-11.

On February 28, 2012 – twenty-four (24) hours after having received the letter, without having met with Respondent on February 28 as proposed, and without having requested or asked to bargain about the decision - the Union filed an unfair labor practice charge claiming violation of Section 8(a)(1) and 8(a)(5) asserting the following:

"In or about February 2012, the Employer, through its agents, officers and representatives has been bargaining in bad faith by laying off 4 unit employees without notifying and bargaining with the undersigned labor organization in violation of the extant collective bargaining agreement." (Emphasis ours) See Statement of Uncontested Facts, ¶12.

On March 2, 2012, the Union responded in writing to Mr. López-Llavona's February 27 letter. In its response, the Union claims that the Respondent's action violates the Collective Bargaining Agreement. Even though the response came after it had filed the Charge, the Union neither requests to negotiate the decision taken by the Company in this matter or affirms that such request was made, nor asserts that the decision was

implemented without giving the Union enough time to bargain over it. See Statement of Uncontested Facts, ¶21-23.

Following the February 28, 2012 Charge, a Complaint was issued on June 29, 2012 in this case alleging, <u>inter alia</u>, that Horizon engaged in the conduct therein pleaded "without prior notice to the Union and <u>without affording the Union an opportunity to bargain with Respondent with respect to this <u>conduct</u> [...]." See Statement of Uncontested Facts, ¶13; Emphasis ours.</u>

Article V of the Collective Bargaining Agreement in effect at all material times between the Union and the Company establishes:

"The operation of the Company's business and the direction of working forces are vested exclusively in the Company, provided that such functions shall not be exercised contrary to any provision contained in this Agreement or to any law. The Union does not hereby waive its legal right to be timely informed of any proposed changes by the Company hereby and to discuss and/or to grieve the effects of same as set forth in the grievance and arbitration provision and as permitted by law." See Statement of Uncontested Facts, ¶14.

The Collective Bargaining Agreement in effect at all material times between the Union and the Company establishes instances where there is a fixed manning requirement, as for example:

- A. When the vessel has more than eleven (11) containers on the third tier, nine (9) men will be contracted for the lashing and unlashing of containers;
- B. A particular number of operators, checkers, longshoremen, drivers and top-loader operators for Terminal Work for each day

- when there is no vessel operations and for those days with vessel operations;
- C. That a fixed floater will be recruited in the terminal operations from Monday to Friday;
- D. The size of the gang, and that there should be two (2) checkers and a hatch-tender per gang;
- E. That there should be one water boy per Horizon's vessel, except when certain gang is called to work. **See Statement of Uncontested Facts**, ¶15.

For instances where the Collective Bargaining Agreement does not contain a particular manning requirement, the Union and the Company agreed and stipulated in the Collective Bargaining Agreement the following:

- A. In Article VIII: General Conditions, ¶ 2:
- "2. <u>The Company will continue exercising all its administrative functions</u>, including the formulation of such fair and reasonable rules which, in the judgment of the Company may be necessary and convenient for the most efficient and economic operation of its business <u>and will particularly determine</u>:
- a. [. . .]
- b. [. . .]
- c. [. . .]
- d. Selection and employment of personnel according to requirements of the Company's business." Emphasis added.
- B. In Article VIII: General Conditions, ¶ 3:
- "3. The Company will determine the number of workers to be employed, the type of work, and the place or location where work is to be performed." See Statement of Uncontested Facts, ¶16.

For the classifications as to which the Respondent informed the Union that it will be recruiting certain positions less – that is to say, for the classifications of "utility," "facilities," and "janitors" - the Collective Bargaining Agreement in effect at all material times between the Union and the Company does not contain a minimum manning requirement. After February 29, 2012 and through this day, Horizon continues to regularly recruit at least seven (7) utility-positions in the Maintenance Department, three (3) facility-positions in the Maintenance Department, and one (1) janitor-position in the Marine Department despite the announcement made in the February 27 letter. See Statement of Uncontested Facts, ¶16.

The Collective Bargaining Agreement in effect at all material times between the Union and the Company contains a very detailed seniority system provision requiring among other things that personnel be selected to work according to their seniority in the specific classification. In this respect, the CBA establishes in its pertinent part:

- A. That "[s]eniority is defined by the length of continuous service of the employee with the Company within a specific classification in the bargaining unit from the date his initial date of hire in the bargaining unit;"
- B. That "[o]nce an employee works 600 hours or more for the Company during an anniversary year in a specific classification, said employee's name will be added to the Company "pilot list" within that classification" and that "[t]he "pilot lists" will be used for the purpose of selecting employees for work assignments by seniority;"

- C. That "[o]nce an employee attains a fixed position within a specified gang or classification his name will appear on that list and will be removed from all other lists, with the exception of the vessel list;"
- D. That "[s]eniority shall be observed for purposes of layoff, retention, vacation, holidays and all other instances where two or more unit employees are involved;"
- E. In regards to the "Pilot lists" that "[o]nce per year the Company will prepare and submit to the Union [a] draft seniority lists in accordance with above sub-paragraph (A) . . [and][t]he Union will then review and either confirm or deny the accuracy of said lists and then inform the Company of discrepancies or corrections with ten (10) business days[,] [t]he Company will then generate new corrected "pilot lists" within ten (10) days;"
- F. And that [t]he Company shall maintain from the "pilot list" a separate list of its own regular permanent workers by classification, [and] [w]hen a vacancy is going to be filled, the first alternate casual from said classification shall be added to the fixed personnel list of that classification; "See Statement of Uncontested Facts, ¶19.

In addition to the above, the Collective Bargaining Agreement contains a Grievance and Arbitration procedure requiring that "[a]ll disputes between the Union and the Company respecting the interpretation or implementation of this Agreement shall be resolved" as therein mandated. See Statement of Uncontested Facts, ¶20.

APPLICABLE LEGAL STANDARD FOR MOTIONS FOR SUMMARY JUDGMENT

The Board's Rules and Regulation in its pertinent part of Section 102.24(b) allows for the filing of a summary judgment no later than twenty-

eight (28) days prior to the scheduled hearing. The applicable law on summary judgment is well defined².

It is by now well known that summary judgment "is a method of promptly disposing of actions in which there is no genuine issue as to any material fact or in which only a question of law is involved." Wright, Miller & Kane, Federal Practice and Procedure, Vol. 10 § 2712, p. 563. In this context, the Supreme Court has ruled that the entry of summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will have the burden of proof at trial." Celotex Corp. v. Cattrett, 477 U.S. 317, 322 (1986); Rodríguez-García v. Dávila, 904 F.2d 90 (1st Cir., 1990).

There are two important inquiries for the trier of facts to consider in granting or denying a motion for summary judgment. These are: materiality and genuineness. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248 (1986). In the determination of materiality the substantive law governs. This is so because "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson, supra, p. 248. On the other hand, an issue is genuine if

² Since in accordance to Section 102.39 of the Board's Rules and Regulations the proceedings conducted "shall, so far as practicable" be conducted in accordance to the rules of civil procedure applicable in the district courts of the United States, the applicable law herein discussed is that of Fed.R.Civ.Proc. Rule 56.

"the evidence is such that a reasonable jury [or trier of facts] could return a verdict for the non moving party." *Id.*

The summary judgment mechanism is regulated by a shift in the burden of production and persuasion. The moving party only needs to "aver an absence of evidence to support the nonmoving party's case." *Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 581 (1st Cir. 1994).* Once the moving party satisfies this requirement, the burden then shifts to the non-moving party to establish the existence of at least one genuine issue of material fact to affect the outcome of the litigation and from which a reasonable trier of facts could find for the non-moving party. *See id. at 581; Febus-Rodríguez v. Betancourt-Lebrón, 14 F.3d 87, 90-91 (1stCir. 1994).*

In confronting a motion for summary judgment, the non-movant cannot merely reargue its case or deny the other party's allegation. Cf. Rule 56(e) of the Federal Rules of Civil Procedure; Varella Cid v. Boston Five Cents Savings Bank, 787 F.2d 676 (1stCir. 1986). In addition, no credit is given to the opposing party's conclusory allegations, improbable inferences and unsupported speculation. Medina-Muñoz v. R. J. Reynolds Tobacco. Co., 896 F.2d 5,8 (1stCir. 1990); Ochoa Realty Corp. v. Faria, 815 F.2d 812,814 (1stCir. 1987).

Although the trier of facts does not engage in weighing evidence and credibility considerations when ruling upon a motion for summary judgment,

it is clear that he must assess whether the evidence presented by non-movant would be "sufficient" for a reasonable jury to find in its favor. Smith v. Stratus Computer Inc., 40 F.3d 11, 16 (1stCir. 1994).

ARGUMENT

A. ASSUMING THE RESPONDENT'S CONDUCT INVOLVED A MANDATORY SUBJECT OF COLLECTIVE BARGAINING, THE UNION WAIVED BY INACTION ANY RIGHT TO BARGAIN OVER THE DECISION SINCE THE UNDISPUTED FACTS OF THE CASE SHOW THAT IT NEVER REQUESTED IT AND THERE IS ABSOLUTELY NO EVIDENCE THAT THE RESPONDENT INDICATED THAT BARGAINING WILL BE FUTILE OR THAT IT IMPLEMENTED ITS DECISION BEFORE IT ANNOUNCED THE SAME TO THE UNION.

1. Applicable law

It is hornbook law that determining that a subject matter is a mandatory topic of negotiation does not conclude the analysis of a purported violation under Sections 8(a)(1) and (5). That is so because "a Union cannot charge an employer with refusal to negotiate when it has made no attempt to bring the employer to the bargaining table." NLRB v. Alva Allen Indus. Inc., 369 F.2d 310 (8th Cir., 1966).

In fact, it is settled law that "when an employer notifies a union of proposed changes in terms and conditions of employment, it is incumbent upon the union to act with due diligence in requesting bargaining." Jim Walter Resources, 289 NLRB 1441 (1988). Failure to do so requires a finding that the Union has waived the bargaining right. Medicenter, Mid-South Hospital, 221 NLRB 670 (1975); Bell Atlantic Corp., 336 NLRB 1076 (2001);

McGraw-Hill Broadcasting, 355 NLRB No. 213 (2010). The Union does not fulfill its obligation to request bargaining by simply protesting the decision or by filing grievances over it (which of course, presupposes the Union's understanding that the CBA has been violated through the Employer's action). W-1 Forest Products Co., 304 NLRB 957, 961 (1991); Haddon Craftsmen, 297 NLRB 462 (1989) (filing grievance does not constitute bargaining request). See also Clarkwood Corp., 233 NLRB 1172 (1977), enfd. mem. 586 F.2d 835 (3d Cir. 1978); Medicenter, supra at 679 (mere protest is not sufficient to satisfy bargaining request requirement).

As settled as the above is the principle that the Union is not relieved of its obligation to request bargaining over the decision because the Employer communicated the proposed change fully developed or in positive terms. Indeed, the case law is just to the contrary in holding that there is nothing unlawful in an employer presenting a proposed change in terms and conditions of employment as a fully developed plan or by using positive language to describe it. Owens-Corning Fiberglas Corp., 282 NLRB 609 fn. 1 (1987); Michigan Ladder Co., 286 NLRB 21 fn. 4 (1987); Southern California Stationers, 162 NLRB 1517, 1543 (1967) (employer did not breach its duty to bargain when its spokesman presented change in conditions of employment as a decision already made).

In the same vein, the case law makes it clear that there is no preestablished rule with which to determine whether the Employer gave sufficient notification to the Union for it to discharge its obligation to request bargaining. In fact, it has been determined that 2 days notice was sufficient for an employer to implement a never-before-use polygraph requirement for continued employment in a context where the ALJ noted that some of the "salient considerations and questions" that made the subject amenable for the collective bargaining process were: the validity and integrity of the testing procedure, the breadth of the test questions; the qualifications of the persons who devise and administer the test, the weight to be attached to "failing" the test, and the consequences of failure, and the right of union representatives or friends to be present during the administration of a potentially frightening procedure alien to the experience of most employees. Midcenter, Mid-South Hospital, supra (see fn. 23 as to the considerations) (cited with approval as to the 2 days notification in McGraw-Hill Broadcasting, 355 NLRB No. 213, fn. 6 (2010)). As established in McGraw-Hill Broadcasting, "It he operative question [in this regard] is whether the Respondent's conduct otherwise objectively communicated to the Union that a request to bargain about the decision would have been futile." McGraw-Hill Broadcasting, 355 NLRB No. 213, p. 2 (2010) (Emphasis added).

2. Application of the law to the undisputed facts of this case

View within the context of the applicable law, there is absolutely no doubt that the Union waived by inaction any right to bargain over the decision it could have in this case.

To begin, the evidence together with the undisputed facts, show that the Union was notified of the Employer's decision before implementation. In other words, there is absolutely no controversy in this case that on February 27, 2012, Mr. López-Llavona on behalf of the respondent informed the Union in writing that effective February 29, 2012, it will not recruit 1 utility position in the Maintenance Department, 2 facilities positions in the Maintenance Department, and 1 janitor position in the Marine Department. It is equally beyond any dispute that at the very same time Mr. López Llavona informed the Union also in writing that the Collective Bargaining Agreement and the custom and practice provided how to proceed in these cases: the affected persons will occupy the first positions in the applicable alternate lists. The evidence furthermore establishes conclusively that this letter was notified to the Union on February 27, 2012 by fax, by email, and by Certified Mail Return Receipt Requested.

As if the above were not enough, the Union's conduct clearly evidences that it had notice of the Respondent's decision before its implementation. In other words, the fact that the Union filed a charge before the Board on February 28, 2012 protesting the Respondent's conduct establishes beyond any doubt that it had knowledge of Respondent's decision before its implementation. It goes without saying that the Union could not have filed the charge if it did not know of the Respondent's planed action.

The notification not only triggers the Union's obligation to request bargaining but clearly shows beyond any dispute that the Union had sufficient opportunity to do so and that there is absolutely no evidence upon which to support a finding that the Respondent objectively communicated to the Union that a request to bargain about the decision would have been futile. Although the decision announced by the Respondent involved four positions, this is a relatively small number and deals with one single proposition: whether the Employer has the right to determine the number of positions to recruit for the listed classifications. Accordingly, the "salient considerations and questions" here involved are much more limited than those involved in Midcenter, Mid-South Hospital, supra, for which two days notice was found sufficient. Also, the notification in the instant case was given in a shop where the parties customarily entertained more than ten (10) different grievances or disputes in a single meeting, some of which the Employer learn of that very same day.

In this context, to allege that <u>objectively</u> the Union did not have sufficient time to simply <u>request bargaining over the decision</u> is just a

conclusory and empty proposition that lacks any support of the facts. Note that the Union had enough time to receive the notification, review it and determine (assuming as we should that the Union does not go to the Board to file charges without a thought process) that it was proper and warranted for them to file a charge, and then go to the Board and filed the charge. The Union had enough time to do all of this by February 28, 2012 at 3:50pm³; in other words, it had enough time to do all of this before implementation. It is, therefore, inescapable to conclude that the Union had in this case sufficient time to request bargaining over the decision if it wanted to do so.

More importantly, the notification forecloses any possible finding that the Respondent objectively communicated to the Union that a request to bargain about the decision would have been futile. Note that in the February 27 letter, Mr. López-Llavona informed the Union that he was available to confer. Concededly, Mr. López-Llavona's statement refers to effect-bargaining as that was what he obviously thought he was obligated to do. However, the dispositive fact here – as phrased by McGraw-Hill Broadcasting, supra – is that the Employer's spokesperson made himself available to confer with the Union without communicating that it will not bargain over the decision. If the Plant Manager's testimony that he had decided on the change before the Union was notified and that he believed that the

³ The date and time when the charge was stamped by the Board. See Exhibit 5 of the Statement of Uncontested

Respondent could make such changes without consultation with the Union was not sufficient in *Haddon Craftsmen*, 300 NLRB 789, 790 fn. 8 (1990) to establish futility of the request, much more less can be said that making itself available to confer without communicating that it will not bargain over the decision is the required proof to establish such futility. Much more to the contrary, precisely because the Respondent made itself available to confer without excluding decision-bargaining the Union is not excused "from testing the Respondent's good faith with a demand to bargain [the decision]." Haddon Craftsmen, 300 NLRB 789, 790 (1990).

Having established that the Union was notified before implementation and that there is no reason to excuse the Union from requesting bargaining, it becomes evident that the decision-bargaining contention of the Complaint needs to be dismissed. This is so because there is absolutely no dispute as to the fact that the Union did not request bargaining over the Respondent's decision and consequently waived any such right even assuming that it existed.

Not only, Mr. López-Llavona – the Respondent's spokesperson for bargaining purposes – declares that the Union did not request or ask him to bargain over the decision, but the undisputed evidence show that he together with his bargaining team was available to confer with the Union on February

28 and 29 but the Union did not show. This, by itself, is sufficient to dismiss the contention for it conclusively establishes that the Union did not act with due diligence in requesting bargaining and thus waived any right to do so it may have.

The surrounding facts of this case, in addition, establish beyond any doubt that the Union did not request bargaining over the decision. Note, that in the Charge filed before the Board on February 28 the Union simply states that employer took action "without notifying and bargaining with the undersigned labor organization <u>in violation of the extant collective bargaining agreement</u>." (Emphasis ours). The only relevant provision of the Collective Bargaining Agreement that refers to bargaining with the Union over any decision refers exclusively to effect-bargaining. See Statement of Uncontested Facts, ¶14, Art. V of the Collective Bargaining Agreement.⁴ The Charge does not make any reference to having requested bargaining over the questioned decision.

Equally important is the fact that the Union's official response to Respondent's February 27 letter fails in the same way. In other words, even

⁴ Art. V of the Collective Bargaining Agreement reads as follows:

[&]quot;The operation of the Company's business and the direction of working forces are vested exclusively in the Company, provided that such functions shall not be exercised contrary to any provision contained in this Agreement or to any law. The Union does not hereby waive its legal right to be timely informed of any proposed changes by the Company hereby and to discuss and/or to grieve the effects of same as set forth in the grievance and arbitration provision and as permitted by law."

after having filed the Charge, in its response the Union simply claims that the Respondent's action violates the Collective Bargaining Agreement and neither requests to negotiate the decision taken by the Company in this matter or affirms that such request was made, nor asserts that the decision was implemented without giving the Union enough time to bargain over it.

In sum, there is absolutely no evidence capable of creating a triable issue as to the fact that the Union did not request bargaining over the Respondent's decision and accordingly, said part of the Complaint should be dismissed as a matter of law.

B. In any case, assuming the Respondent's conduct involved a mandatory subject of collective bargaining, the union waived by contract any right to bargain over the decision since the undisputed facts show that the parties bargained this to an agreement incorporated into clear and unmistakable provisions of the Collective Bargaining Agreement.

1. Applicable Law

It is settled that a Union can waive statutory rights. Metro. Edison Co. v. N.L.R.B., 460 U.S. 693, 708, 103 S. Ct. 1467, 1477, 75 L. Ed. 2d 387 (1983). Accordingly, it has long been held by the case law that the Act is not violated when an employer takes unilateral actions involving matters over which the Union clearly and unmistakably waived its right to bargain in the Collective Bargaining Agreement in effect between the parties. Good Samaritan Hospital, 335 NLRB 901 (2001) (dealing with the Employer's right to determine staffing levels).

This principle was put into effect very recently in *Kennametal Inc.*, 358 NLRB No. 68 (June 26, 2012). In that case, the Collective Bargaining Agreement between the parties contained the following pertinent provisions:

"16.01 The Employer and the Union will cooperate in the continuing objective to eliminate accidents and health hazards. <u>The Employer shall continue to make reasonable provisions for the safety and health of its employees at the Plant during the hours of their employment.</u>

16.05 The Employer and the Union agree to cooperate in the maintenance of the Employer's safety program and <u>in the enforcement</u> of such reasonable safety and health rules as may from time to time be established by the Employer." (Emphasis ours).

In ruling that the Employer did not violate the Act by unilaterally implementing a safety checklist requirement without giving the Union the opportunity to bargain over the decision, it was noted that:

"Nevertheless, we find, contrary to the judge, that article 16 of the collective-bargaining agreement is a clear and unmistakable waiver of the Union's right to bargain over the decision to implement the safety checklist requirement. Section 16.01 provides that the Respondent "shall continue to make reasonable provisions for the safety and health of its employees." Section 16.05 refers to "such reasonable safety and health rules as may from time to time be established by the Employer." Read together, these two provisions are sufficiently specific to constitute a waiver of the Union's right to bargain over safety rules. See United Technologies Corp., 287 NLRB 198, 198 (1987), enfd. 884 F.2d 1569 (2d Cir. 1989) (finding clear and unmistakable waiver of the union's right to bargain over a change to progressive discipline for absenteeism because the collective-bargaining agreement provided that the employer had "the right to make and apply rules and regulations for production, discipline, efficiency, and safety")." (Emphasis added).

2. Application of the law to the undisputed facts of this case

Reviewing the Collective Bargaining Agreement in this case under the applicable law, it becomes evident that even assuming that the Respondent's action involves a subject of mandatory bargaining and that the Union did not waive its right by inaction, it certainly did so by contract. Under these circumstances, the Respondent did not need to re-bargain its right again before it was privileged to implement its decision.

As demonstrated above, on February 27 the Respondent informed its decision of not recruiting 1 utility position in the Maintenance Department, 2 facilities positions in Maintenance Department, and janitor position in the Marine Department. As a consequence of that core-decision, Mr. López Llavona informed the Union in the February 27 letter that the Collective Bargaining Agreement and the custom and practice provided how to proceed in these cases: the affected persons will occupy the first positions in the applicable alternate lists.

The CBA clearly and unmistakably preserves the specific right to determine the number of workers to be employed for the Respondent in several specific provisions. First, Art. V establishes that "[t]he operation of the Company's business and the direction of working forces are vested exclusively in the Company, provided that such functions shall not be exercised contrary to any provision contained in this Agreement or to any law." With more

specificity, Article VIII – "General Conditions" ¶ 2, establishes that "[t]he Company will continue exercising all its administrative functions, [. . .] and will particularly determine: (d) [the] [s]election and employment of personnel according to requirements of the Company's business" (emphasis added). As if the previous language were not enough, Article VIII – "General Conditions", ¶ 3, establishes plainly that:

"3. The Company will determine the number of workers to be employed, the type of work, and the place or location where work is to be performed." See Statement of Uncontested Facts, ¶16.

In this case it is beyond any dispute, therefore, that the parties in the CBA bargained a strict seniority system to select employees for work, that they provided that "[t]he Company shall maintain from the "pilot list" a separate list of its own regular permanent workers by classification" (emphasis added) and that the Union and the Company specifically agreed that "[t]he Company will determine the number of workers to be employed"." That the Union knew or should have known what those provisions meant is clearly evidenced by the fact that when it was intended for the Company to have fixed manning – meaning a fixed number of positions – the parties negotiated and specifically agreed to it. See the instances of fixed manning requirements in the Statement of Uncontested Facts, ¶15. The only plausible reason for the quoted contractual language is that the parties agreed that for all other instances where there is no fixed manning

requirement, it is the Employer who determines the number of positions it is going to recruit. In other words, it would have made no sense whatsoever to negotiate and agreed to all those provisions if it were not to make clear that in those instances where there is no fixed manning requirement the Company is free to "determine . . . [the] employment of personnel" and to "determine the number of workers to be employed." These contractual provisions can mean no other thing than what they say.

Since there is absolutely no controversy in that there is no fixed manning requirement for the classifications for which the Company informed that it was recruiting certain positions less, it is beyond any dispute that the Respondent was privileged to implement its decision without bargaining it first since the Union had waived any such right by contract. As a matter of law, therefore, the pleaded failure to bargain over the decision in the Complaint should be dismissed.

Note that if anything the contractual language in this case is more specific that the one in question in *Kennametal Inc.*, 358 NLRB No. 68 (June 26, 2012). In *Kennametal* because of contractual language that provided that "[t]he Employer shall continue to make reasonable provisions for the safety and health of its employees at the Plant during the hours of their employment" and that "[t]he Employer and the Union agree to cooperate [. . .] in the enforcement of such reasonable safety and health rules as may from

time to time be established by the Employer" the Union had clearly and unmistakably waived its right to bargain over the decision to implement safety rules. Here, the contractual language contains the same "will continue exercising" language but asserts in affirmative manner that the Company "will particularly determine" "[the] employment of personnel according to requirements of the Company's business" and that it "will determine the number of workers to be employed." If Kennametal, decided on June 26, stands the present case must fall.

WHEREFORE, it is respectfully requested that the present Motion be granted and in its consequence that partial Summary Judgment be GRANTED for the Employer dismissing the allegations of the Complaint regarding the failure to bargaining the decision in question.

RESPECTFULLY SUBMITTED.

IT IS HEREBY CERTIFIED that on this same day a true copy of the foregoing document was notified to the Regional Office and to the Union pursuant to Section 102.114 of the Board's Rules and Regulations.

In San Juan, Puerto Rico, this 18th day of July, 2012.

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